Martin S. King, Esq.
Jori Quinlan, Esq.
WORDEN THANE P.C.
321 West Broadway, Suite 300
Missoula, Montana 59802
Telephone: (406) 721-3400
Fax: (406) 721-6985
mking@wordenthane.com
jquinlan@wordenthane.com
Attorneys for Defendant Salish Kootenai College

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

FAWN CAIN, TANYA ARCHER, and SANDI OVITT, Relators and Plaintiffs, -vs- SALISH KOOTENAI COLLEGE, INC., SALISH KOOTENAI COLLEGE FOUNDATION, ROBERT FOUTY, individually, JIM DURGLO, individually, RENE PEIRRE, individually, ELLEN SWANEY, individually, LINDEN PLANT, individually, TOME ACEVEDO, individually, ZANE KELLY, individually, ERNEST MORAN, individually, LUANA ROSS, individually, CARMEN TAYLOR, individually, ELAINE FRANK, individually, LISA LACKNER HARMON, individually, REBEKKAH HULEN, individually, DAWN BENSON, individually, and DOES 1-10, Defendants.	CV 12-181-M-BMM **REPLY BRIEF OF SALISH KOOTENAI COLLEGE IN SUPPORT OF ITS RENEWED MOTION TO DISMISS**

Defendant Salish Kootenai College ("the College") submits this reply brief in support of its renewed motion to dismiss the College from this action for lack of subject matter jurisdiction.

I. Plaintiffs' arguments are in many instances irrelevant and rely on inapplicable law.

The issue this Court has been asked to decide on remand is straightforward: whether the College is an arm of the Confederated Salish and Kootenai Tribes ("Tribes" or "CSKT"). If it is, the College shares in the Tribes' sovereign status and is not a "person" that can be sued under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733.[1] As the Ninth Circuit explained, this Court must analyze the relationship between the College and the Tribes using the factors set out in *White v. University of California*, 765 F.3d 1010 (9th Cir. 2014). *Cain*, 862 F.3d at 944.

Rather than focus on the *White* factors, Plaintiffs devote much of their brief to arguments that are either irrelevant or predicated on inapplicable legal standards. Most glaring is the Plaintiffs' assertion throughout their brief that the College "waived" its sovereign immunity, thus bringing it within the reach of the FCA. Incredibly, this is the *identical* argument the Ninth Circuit expressly rejected in *Cain*:

> This means we need not decide whether the Collegevoluntarily waived its sovereign immunity. If the College is a sovereign entity to which Congress didn't intend the FCA to apply, the College cannot make the FCA apply to itself by voluntarily waiving its sovereign immunity.

862 F.3d at 941.

[1] The Ninth Circuit held conclusively that the Tribes are a sovereign and not a "person" under the FCA. *United States ex. rel. Cain v. Salish Kootenai College*, 862 F.3d 939, 943 (9th Cir. 2017).

Plaintiffs also rely on cases that discuss the "arm of the state" test for *state* entities. This case concerns the "arm of the tribe" test under *White*. The "arm of the state" and "arm of the tribe" tests are separate and distinct. *Cain,* 862 F.3d at 944. Plaintiffs continue to rely on the wrong test.

Plaintiffs' stubborn use of the wrong test is exemplified by their citation to *Cook County Ill. v. U.S. ex. rel. Chandler*, 538 U.S. 119 (2003), to suggest that because the IRS has identified the College as a "political subdivision" of the Tribes at Revenue Procedure 84-36, the College somehow is not an arm of the Tribes. *Chandler* did not involve an "arm of the tribe" analysis but rather held that a municipal corporation is a person under the FCA based on congressional intent. *Chandler* was expressly distinguished by the *Cain* Court, 862 F.3d at 944, and has no applicability here.

Moreover, the IRS's classification of the College is available only to entities that are under the control of a tribe. IRS, *Federal Unemployment Tax (FUTA) Exception for Tribes*, available at https://www.irs.gov/government-entities/indian-tribal-governments/federal-unemployment-tax-futa-exception-for-tribes. The College's exemption from federal unemployment taxes thus demonstrates it is an arm of the Tribes.

Plaintiffs' also devote three pages to claiming, without reference to any evidence, that the College engaged in "fraudulent conduct" in order to qualify for

the subject grants. Although these unsupported allegations are irrelevant to the determination of this motion, they are vehemently denied by the College. That the United States has refused to intervene as a party in this case speaks volumes about the "merits" of Plaintiffs' claims.

II. The College is an arm of the Tribes under *White*.

In its opening brief, the College analyzed in detail its relationship to the Tribes under each of the *White* factors. In so doing, the College provided to the Court hundreds of pages of documents, including a corresponding demonstrative exhibit, supporting each *White* element.

When the Plaintiffs finally address the *White* factors in their response, beginning for the first time at page 17 of their brief, their arguments are legally and factually unsupported and unpersuasive, despite having half a year to discover evidence to support their theory.

1. The Method of Creation of the College

In response to the College's detailed explanation of how the College was chartered and incorporated by the Tribal Council and remains qualified as a "tribally controlled college" because of the Council's ongoing sanction, the Plaintiffs make three responses. First, they claim that by incorporating under state law, the College waived sovereign immunity. Second, they try to distinguish between "Salish Kootenai Community College" and "Salish Kootenai College."

Third, they claim the College did not follow tribal procedures in its incorporation.

a. Plaintiffs' claim of waiver is irrelevant and wrong.

Plaintiffs' assertion that the College waived its sovereign immunity by incorporating under state law is irrelevant and inaccurate. As discussed above, an arm of a sovereign cannot waive itself into the definition of a person under the FCA. *Cain*, 862 F.3d at 941. Hence, Plaintiffs' argument is irrelevant to the analysis of the first *White* element.

Additionally, numerous cases including *White* hold that incorporation, even only under state law, is not a waiver of sovereign immunity. E.g. *White,* 765 F.3d at 1025; *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000) (tribal community college chartered by tribe as non-profit corporation under state law is entitled to sovereign immunity). The College is incorporated under *both* tribal law and state law, but even if it were not, state incorporation did not waive sovereign immunity.

b. Salish Kootenai College and Salish Kootenai Community College are the same entity.

The College has described with specificity, and produced numerous supporting records, explaining the formation of the College under tribal law and state law as well as the name change from "Salish Kootenai Community College" to "Salish Kootenai College." The state and tribal corporate "entities" have always been recognized as the same entity, including by both the Tribes and the Ninth

Circuit. *See e.g. Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129 (9th Cir. 2006) (implicitly rejecting Smith's argument that the state and tribal entities were distinct in holding that "[t]he Tribes incorporated SKC under tribal law in 1977, and a year later SKC was incorporated under state law").

As previously briefed, at the time of the College's creation in 1977, tribal colleges generally were called "community colleges" in accordance with the "Tribally Controlled Community College Act." In 1981, the College dropped "community" from its name to, among other reasons, alleviate confusion about funding sources since the College is not supported though private property taxes like community colleges formed under Montana law. The name change was made at the state level and is reflected in annual reports filed by the College with the Tribes. (Exs. 5, 7). The Tribes regularly recognize "Salish Kootenai College" as the entity they formed in 1977. (Exs. 1, 8, 22.)

Plaintiffs' ruminations that the state corporation is a separate entity ignores reality and attempts to elevate form over substance. Even if Plaintiffs' claims were somehow true and the College were incorporated only under state law as claimed by Plaintiffs, that still does not change the fact that the College remains an arm of the Tribes. *White*, 765 F.3d at 1025; *Duke v. Absentee Shawnee Tribe of Okla. Housing Auth.* 199 F.3d 1123, 1125 (10th Cir. 1999).

c. The College is properly incorporated.

Plaintiffs complain that the form of the Annual Reports filed by the College with the Tribes does not conform exactly with the language of the College's original Articles of Incorporation. The reports filed by the College comply with the Tribes' annual report forms for tribal corporations, and Plaintiffs ignore the College's regular oral reports to the Tribal Council. Moreover, since the *Tribes* continue to consider the College a tribal nonprofit corporation, the Plaintiffs' complaints about corporate formalities are irrelevant. Finally, the language of the annual reports does not change the fact that the College is an arm of the Tribes.

The method of creation of the College, at the direction and under the ongoing control of the Tribal Council, satisfies the first element of the *White* test.

2. The Purpose of the College

As explained in the College's opening brief, the second element of the *White* test is easily satisfied since the uncontroverted evidence shows the Tribes' purpose in establishing and maintaining the College has been to further the skills and competencies of tribal employees, provide educational opportunities to tribal members, and further cultural preservation. (Ex. 3.)

The Plaintiffs' response is two-fold: First, they claim that the articles of incorporation are "geographical" because they refer to providing post-secondary opportunities "… for residents of the "Flathead Indian Reservation," and second, they argue the purpose of the College is not tribal because enrollment of CSKT

members is less than 50%.

Plaintiffs' "geographical" argument is wrong for two reasons. First, the geographical location that the articles refer to, the "Flathead Indian Reservation," describes the precise territory that is governed by the sovereign Tribes. Thus the reference supports the conclusion that the College is an arm of the Tribes.

Second, several of the cases cited by the Plaintiffs, such as *United States ex. rel. Oberg v. Pa. Higher Education*, 745 F.3d 131 (4th Cir. 2014), are "arm of the state" cases and in several, the agencies at issue were held to indeed be arms of the state. They provide zero support for the Plaintiffs' argument.

Plaintiffs' suggestion the purpose of the College is not being fulfilled because enrollment of CSKT tribal members is less than 50% of total enrollment is also unsupported by any legal authority and disregards practical reality. First, while enrollment of CSKT tribal members is less than 50% of total College enrollment, enrollment of Native Americans is greater than 50%. Moreover, regardless of what percentage of the student body CSKT members make up, which has never been a measure of its "purpose," the College has undertaken numerous efforts to further its purpose of educating tribal members, as previously outlined for the Court.

Plaintiffs' argument on the second element is irrelevant and without support. At its core, Plaintiffs complain the College educates persons other than CSKT tribal members. That is not the test for an arm-of-the-tribes analysis. Indeed, cross-

cultural education is an appropriate purpose underlying tribal sovereignty. *See Breakthrough Mgt. Grp.*, 629 F.3d at 1187 (recognizing "promotion of commercial dealings between Indians and non-Indians" as a fundamental purpose underlying sovereign immunity). Educating tribal members has always been a fundamental purpose of the College, but the College appropriately serves other students as well.

3. The Structure, Ownership, and Management of the College, Including the Amount of Control Exercised by the Tribes

In response to the College's exhaustive description of how the Tribes own, manage, and control the College, the Plaintiffs offer four responses. They argue the College is not subject to the Tribes' control because, first, the College controls its day-to-day affairs; second, the College is accredited by the Northwest Commission on Colleges and Universities (NWCCU); third, the College is not part of the Tribes' "education department"; and last, the College is in charge of its own curriculum.

As explained in the College's opening brief, the College is a tribally controlled college ("TCU") under the Tribally Controlled Colleges and Universities Act ("TCCUA"). The charter and ongoing sanction of the College by the Tribes is essential to the College's qualification as a TCU. 25 U.S.C. §1801(a)(4). An additional qualification requirement is that the College be accredited, in this case, by the NWCCU. Under NWCCU guidelines, the College

must have a governing board and operate with appropriate autonomy. NWCCU *Accreditation* Standards Std. 2A, 2A23.

The College is careful to preserve this "appropriate autonomy" because without it, the College would lose its accreditation, its TCU status, and funding. The TCCUA is a significant source of federal funding for tribal colleges, including the College. Additionally, without appropriate accreditation, the College would not attract students and, without students, could no longer function as a competitive post-secondary institution. It could not fulfill its fundamental purposes if it were unable to attract students and compete as a post-secondary college.

Plaintiffs suggest the Tribes must make all decisions for the College in order for the College to be an arm of the Tribes. There is literally no legal support for such an argument and it is contrary to the conclusion reached in numerous cases, including *White*. Incorporation under state law, and operation of the entity as a corporation, does not mean the College is not an arm of the tribe. *White*, 765 F.3d at 1025; *Modoc v. Pink*, 157 F.3d 1185, 1187 (9th Cir. 1998) (non-profit corporation that provided health services, off-reservation, held to be arm of the chartering tribes).

If Plaintiffs' position is accepted as law, every accredited TCU will be at risk for losing its sovereign status by virtue of its compliance with accreditation standards that require "appropriate autonomy." Plaintiffs' argument has no merit or

support and, wittingly or not, attacks the entire structure of tribally controlled colleges in the United States.

Plaintiffs' assertion that the third element is not satisfied because the College is not part of the Tribes' "Education Department" is of no relevance. The Tribal Council minutes and Tribes' annual reports demonstrate significant coordination, and the College remains an arm of the Tribes regardless of the Tribes' bureaucratic structure. Likewise, the College plans its curriculum with occasional input from the Tribes and within its day-to-day management authority.

For the reasons discussed in the College's opening brief, the third *White* element supports that the College is an arm of the Tribes.

4. The Tribes' Intent to Share its Sovereignty with the College

As the College explained in its opening brief, the fourth *White* element is is met in this case for numerous reasons, probably the most compelling being that the Tribes have joined in this and other cases for the purpose of articulating the Tribes' position that the College is an arm of the Tribes and it is the Tribes' intention that the College share in the Tribes' sovereignty. (Ex. 8.) It seems patently ridiculous for the Tribes and the College to both articulate that it is, and always has been, their intent that the College share in the Tribes' sovereignty, only to have the Plaintiffs argue, without authority, that they had some other intent. On top of that, Congress also expressly intended tribal colleges to further tribal

sovereignty, and there is no evidence here that the College has not done exactly that.

Without citing a single legal authority, Plaintiffs argue the Tribes do not share sovereignty with the College because there are contracts between the College and the Tribes. The memoranda of agreement the College has had with the Tribes and tribal departments and the College's real property leases of tribal trust land help organize the complex and overlapping relationships between the Tribes and the College. They actually demonstrate the College acts as an arm of the Tribes, rather than the opposite. *See e.g.* Ex. 22 ("The purpose of this [MOU] is to institute a cooperative financial relationship between the [Tribes] and the [College] for partial funding and coordination of efforts to provide public higher education for Tribal members and other residents of the Pacific Northwest in conformity with the charter of the College executed by the Tribal Council in 1977 . . . . The [Tribes] are authorized to . . . manage all economic affairs and enterprises of the [Tribes] including the provision of public education.... The College is charged with responsibility to provide public education and related services in conformity with the provisions of its charter and the wishes and directives of the Tribal Council and in conformity with the requirements of the various funding sources of the College's programs and activities.").

The illogical nature of the Plaintiffs' argument is compounded when they complain, again without authority, that the College does not share in the Tribes' sovereignty because the Tribes does not provide indemnity for the College. On the one hand, the Plaintiffs complain there are contracts between the Tribes and the College, and on the other complain there are no contracts of indemnification. Neither is relevant to the intent of the Tribes or the fourth *White* element.

5. The Financial Relationship Between the Tribes and the College

In its opening brief, the College explained at length the extent of the financial relationship between the College and the Tribes. The Plaintiffs' primary response is to erroneously claim that satisfaction of this element requires that the Tribes be liable for any judgment entered in this action against the College.

The tribal sovereignty cases cited by the Plaintiffs are neither controlling nor applicable to this case. *Runyon v. Association of Village Council Presidents*, 84 P.3d 437 (Alaska 2004), an Alaska Supreme Court case from 2004, and *Johnson v. Harrah's Kansas Casino Corp.*, 2006 WL 463138 (D. Kan. 2006), which is not even cited in the Federal Reporter, are pre-*White* cases outside the Ninth Circuit that do not address the *White* factors. Plaintiffs fail to cite to any persuasive much less binding authority.

What Plaintiffs are again arguing is the arm-of-the-state test. The problem for Plaintiffs is that the arm-of-the-state test, and the requirement that the sovereign

have "direct or functional" liability in order for the entity to share in its sovereignty, was expressly rejected by the Ninth Circuit as the applicable test when it remanded this case. *Cain*, 862 F.3d at 944. In any case, as argued in the College's opening brief, the Tribes would indeed be impacted by a judgment against the College, since the Tribes chartered the College to provide post-secondary education on the Flathead Reservation and the College's financial health is critical to that mission.

Next the Plaintiffs make the blatantly wrong statement that most of the College's income comes from the Foundation and not from the Tribes. Rather, the audits demonstrate that the College's revenues derive from tuition and fees, TCCUA funds, federal grants and contracts, state grants and contracts, other grants and contracts, indirect cost recoveries, and sales and services of education activities and auxiliary enterprises, with the Foundation primarily soliciting, holding, and investing endowment funds. (*See* Audits, Ex. 13.)

Plaintiffs have offered no evidence or argument to rebut that the financial relationship between the College and the Tribes supports the fifth *White* element.

III. The preponderance of the evidence demonstrates that the College is an arm of the Tribes

It is the Plaintiffs' burden as the party asserting federal jurisdiction to prove that the College is a "person" under the FCA. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Indeed, that is the whole purpose for allowing the Plaintiffs

the opportunity to conduct jurisdictional discovery.

Regardless of who bears the burden, though, the preponderance of the evidence in this case—in fact the overwhelming evidence—proves the College is indeed an arm of the Tribes under the *White* factors. As an arm of the Tribes, the College is not a person under the FCA and cannot be sued under the FCA.

CONCLUSION

For the foregoing reasons, and for the reasons explained in the opening brief of the College and the amicus brief of the Tribes, this action as against the College should be dismissed for lack of subject matter jurisdiction.

DATED this 14th day of February 2018.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King

CERTIFICATE OF COMPLIANCE

In accordance with U.S. District Court Local Rule 7.1(d)(2), the undersigned certifies that the word count of the above brief, as counted by the undersigned's word processing software and excluding the caption, table of contents, table of authorities, and certificates of service and compliance, is 3,195.

WORDEN THANE P.C.

/s/ Martin S. King
Martin S. King